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FILE COPY

No. 200.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

v.

J. G. MENIHAN CORP., J. G. MENIHAN, SR., and
J. G. MENIHAN, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion of the District Court is reported in 29 Fed. Supp. at page 853. The opinions of the United States Circuit Court of Appeals for the Second Circuit are reported in 111 Fed. (2d) beginning at page 940.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on May 23rd, 1940 (Record, p. 19). The petition for a writ of certiorari was granted by this Court on October 14th, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Question Presented.

Has the District Court power to impose costs upon the petitioner, a corporate agency of the United States?

Statement of Facts.

In 1934 the Reconstruction Finance Corporation made three separate loans to The Menihan Company (not the respondent) aggregating Two hundred and fifty thousand Dollars ($250,000.00). This Company was unable to pay, and went into bankruptcy. Among the assets pledged by it to the petitioner were its trademarks and trade names, "Menihan," and "Arch-Aid." On a Trustee's sale in bankruptcy, the petitioner purchased substantially all the real estate and personal property of the bankrupt, including its trademarks and trade names (R. pp. 5-6).

In 1937 the respondent corporation, J. G. Menihan Corp., was formed, with J. G. Menihan, Sr., as its president. He had been president of the old corporation. The new company began the manufacture and sale of shoes, using the trademarks and trade name "Menihan" and "Arch-Aid."

In September of 1937, the Reconstruction Finance Corporation advertised for sale substantially all of the assets

of the bankrupt which it had purchased from the Trustee in bankruptcy. This was immediately before this suit was commenced on September 30th, 1937. The sale was had on October 3rd, 1937. Petitioner then disposed of, to the public, without restriction, all the physical assets of the bankrupt except an empty factory building. It made no attempt to sell the trademarks and trade names.

This suit was brought to enjoin the respondent corporation and J. G. Menihan, Sr., and J. G. Menihan, Jr., from using the trademarks and trade names above described in respondent corporation's business (R. 7, 8). Aside from the question whether the Messrs. Menihan could be restrained from using their own surnames in their business, whether in corporate form or not, and the question whether a valid trademark could exist in the purely descriptive words, "Arch-Aid," the plaintiff's case was hopeless from the start. The R. F. C. having sold everything to which a trademark could attach, the Court below correctly held that it had no right to a trademark in gross, and that such a thing could not exist (R. 7).

It further determined that even if the trademark "Arch-Aid" could be held to have acquired a secondary meaning, a decree awarding the plaintiff the exclusive use of it would lead to a potential fraud upon the public (R. 9).

All the facts upon which the District Court based its decision dismissing the complaint upon the merits were known to the plaintiff, either prior to the commencement of its action, or after the sale on October 3rd, 1937. Its maintenance of the action thereafter was without probable cause, for while probable cause may arise from a mistake of fact,

it can never be predicated upon a mistake of law (*Director General of Railroads v. Kastonbaum*, 263 U. S. 25, 27, 28). The maintenance of this suit after the plaintiff's transactions on October 3rd, 1937, seems ~~not only~~ purely vexatious, ~~but vindictive and venomous~~. Had the plaintiff obtained a preliminary injunction (it asked for it in the complaint, R. 3) it might, in a subsequent action, have been held liable for the whole expense and damage to which it put the respondents in defending this suit. Instead, when asked to pay only such expenses as are allowed as statutory costs, and a limited extra allowance, to recoup in a small part only, this expense and damage, petitioner hides behind the dignity and sovereignty of the United States, to which it asserts it is still tethered by the umbilical cord.[1]

Summary of Argument.

The United States are immune from liability, from suit, and from costs, by reason of their sovereignty. This is undisputable. However, consent to liability to suit and to costs may be granted by Act of Congress. Even when consent is given, it may be modified or wholly withdrawn at any time, even after suit is brought.

Imhoff Berg Silk Dyeing Co. v. U. S., 43 Fed. (2d), 836.

U. S. v. Henszen, 206 U. S. 237.

The sovereign is not liable for costs ordinarily, whether plaintiff or defendant, but this immunity does not arise because costs are an incident of the suit or of the judgment, or because they are a separate and substantive right. It

1. "Thou wear a lion's hide! Doff it for shame,
And hang a calfskin on those recreant limbs."
(King John, Act III, Scene 1)

arises because consent has not been obtained, or because, if obtained, it is not broad enough to cover the claim or case. The waiver must be found in an Act of Congress, and there is no liability outside the express terms of the Act.

But this immunity of the United States, arising by reason of their sovereignty, does not pass to their creatures by implication. Congress can confer it by express grant (*Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, p. 389), "but always the question is, has it done so." The answer to this question would seem solely to be found in the Act erecting the particular corporation, for if the Act is silent on the subject, no immunity is implied (*ibid*, page 393).

An examination of the Act erecting the Reconstruction Finance Corporation discloses no express grant of immunity from costs, whether they are to be considered an incident of the suit or a separate substantive right or liability. Rather, the phrases therein conferring immunity (15 U. S. C. 610, 47, Stat. 10) from taxes, except upon real estate, coupled with the phrase, "to sue and be sued," would seem to delimit its exemptions, and to destroy its claim of non liability for incidents of a permitted suit or substantive matters to be adjudicated therein.

If ordinary court costs are permissible, there seems to be no adequate reason why an additional allowance cannot be granted. The power of a Federal Court of Equity to grant such an allowance has been recognized by this Court in a long line of decisions, of which the latest appears to be *Sprague v. Ticonac National Bank*, 307 U. S. 161, and see cases on the margin at pages 164 and 165.

These considerations would seem also to dispose of the objections made to the allowance of costs in the Circuit Court of Appeals, and to require an affirmance of the judgment below.

Argument.

A. THE IMMUNITY OF THE UNITED STATES FROM COSTS, EXCEPT BY THEIR EXPRESS CONSENT, IS BEYOND QUESTION.

Hamilton, in the *Federalist* (No. 81) makes these profound remarks:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. * * * The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will."

quoted from *Hans v. State of Louisiana*, 134 U. S. 1.

And indeed it would seem that this conclusion is inescapable, for "Sovereignty," as defined, "imports the supreme absolute and uncontrollable power by which any independent state is governed." The definition is Judge Cooley's, but the exemption seems to be of ancient origin. "The King is below the law, although he is below no man and below no court of law." *(Pollock & Maitland, History*

of English Law, Second Edition, Volume 1, pp. 515, 516.) These learned authors doubt the existence of any prior doctrine to the contrary, and add that if Henry III had been capable of being sued, he would have passed his life as a defendant.

True, the immunity of the United States arises solely by implication. Mr. Justice Frankfurter said in the *Keifer* case, *supra,* that it was academic to inquire whether it rests on the theory that the United States is deemed the institutional descendant of the Crown, or on a metophysical doctrine, there stated, "that there can be no legal right as against the authority that makes the law on which the right depends."

But sovereignty imports supremacy, and supremacy is entire and indivisible. If it is divided, neither part is supreme as to the other. The suggestion implies a contradiction in terms, and the sovereign cannot bestow any part of its sovereignty and remain sovereign, *i. e.,* supreme. It can, if it will, grant to its creature an attribute of its sovereignty, *e. g.,* immunity from suit or liability, but not the sovereignty itself. To do so is to deny its own existence.

The necessary deduction is that any attribute of the sovereign, to be enjoyed by another, must be expressly granted, or, as phrased by Mr. Justice Frankfurter *(Keifer & Keifer v. R. F. C., supra),* "Therefore the government does not become the conduit of its immunity in suits against its agents or instrumentalities simply because they do its work."

B. THE STATUS OF GOVERNMENTAL OR GOVERNMENT OWNED CORPORATIONS BEFORE THE LAW IS PRECISELY THAT OF PRIVATELY OWNED CORPORATIONS.

This doctrine was first enunciated by Chief Justice Marshall in *Bank of the U. S. v. Planters' Bank of Georgia*, 9 Wheaton 904, and has remained unchanged ever since. It has never been more clearly stated:

> "It is, we think, a sound principle, that when the government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus many states of this Union who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. *As a member of a corporation, the government never exercises its sovereignty.*"

This would seem to make clear that there is, and can be, no immunity by implication.

Nevertheless, so far as we can ascertain, neither the petitioner herein, nor any of its associates whose stock is owned wholly or in part by the United States, has voluntarily acquiesced in this decision. They and all of them claim, or have claimed, immunity on one or both of two theories; one that by some fallacious but *soi disant* indent of cover-

ture, they have become, as it were, brides of the sovereign, and, as such, entitled to the royal prerogative; the other, that by immersion in the Stygian waters of the Potomac, they have been made, like Achilles, invulnerable to the attacks of mortal man.

United States v. Strang, 254 U. S. 491, 493.
Pope v. Emergency Fleet Corp., 269 Fed. 319, 320.
Pullman Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587.
Salas v. United States, 234 Fed. 842 (C. C. A. 2).
Panama R. Co. v. Minnix, 282 Fed. 49-50.
The Pesaro, 277 Fed. 473.
Federal Sugar Refining Co. v. United States Sugar Equalization Board, 268 Fed. 575, 584.
Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 388.
Ingersoll Rand Co. v. U. S. Shipping Bd., 195 App. Div. (N. Y.) 838.
Providence Engineering Corp. v. Downey Shipbuilding Corp., 294 Fed. 641 (C. C. A. 2).
Pennell v. Home Owners' Loan Corp., 21 Fed. Supp. 497.
Inland Waterways Corp. v. Hardee, 300 Fed. 678, 689.
In re Missouri Pac. R. Co., 13 Fed. Supp. 888.
Lord & Burnham v. U. S. Shipping Bd. Emergency Fleet Corp., 265 Fed. 965.

In all of these cases, some sort of immunity was claimed, and in every one, the claim was rejected. As was said by Mr. Justice Holmes in *Sloan Shipyards v. U. S. Fleet Corp.*, 258 U. S. 549, at page 567,

> "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They

have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if any one would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of Government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. Osborn v. Bank of United States, 9 Wheat. 728, 842, 843, 6 L. Ed. 204; United States v. Lee, 106 U. S. 196, 213, 221, 1 Sup. Ct. 240, 27 L. Ed. 171. The opposite notion left some traces in the law, (1 Roll. Abr. 95, Action sur Case, T.) but for the most part long has disappeared.

"If what we have said is correct it cannot matter that the agent is a corporation, rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

This would seem lucid enough, but some kind of immunity was repeatedly urged (and refused) in some of the later cases cited above. In the *Keifer case, supra,* (306 U. S. 381) it became necessary for this Court to emphasize what it had declared before, by saying, through Mr. Justice Frankfurter, that immunity was never presumed; that it never arose out of mere implication; that it could be conferred by Congress, of course, but that unless it had been

expressly so conferred, it must be deemed to have been withheld. "Congress may of course," he says, "endow a governmental corporation with the government's immunity. But always the question is, has it done so?" And the Court rules that the immunity, to exist at all, must be found in the Act of Congress creating the corporation, and that the immunity claimed was not there so found.

It was thought that this decision, read in the light of Chief Justice Marshall's statement in *Weston v. City Council of Charleston*, 2 Pet. 449, 464[1] and the plain words of the statute making costs a part of the judgment [2] as well as the rulings of this Court in *Newton v. Consolidated Gas Co.*, 264, U. S. 78, p. 83 to the effect that a decree for costs is a judgment in a suit; and in *The Baltimore*, 8 Wall, 377, 390, to the effect that costs are an incident to the judgment[1], would, when construed together, remove this controversy from that which Abraham Lincoln called "the realm of pernicious abstraction." However, since more than one of these governmental corporations claimed another immunity (that from third party process), and had had this claim allowed in some of the State Courts[2] it therefore became necessary for this Court to restate and reaffirm its position on the legal status of these governmental corporations, especially

1. "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

2. "Same, bill of; taxation. The bill of fees of the clerk, Marshall, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." Sec. 830, Title 28 U. S. C.

1. cf. Rooney v. Second Ave. R. R. Co., 18 N. Y. 368, 369, 370.

2. See cases referred to in footnote to Federal Housing Administration v. Burr, 309 U. S. 242, 243.

in regard to their constantly recurring claims to share some part of the immunity of the sovereign. This it did, clearly and emphatically, in *Federal Housing Administration v. Burr*, 309 U. S. 242, using the following language:

> "As indicated in Keifer & Keifer v. Reconstruction Finance Corporation, *supra*, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. Keifer & Keifer v. Reconstruction Finance Corporation, *supra*. Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

But, reluctantly conceding the authority of these cases, petitioner now asserts that there is something peculiar about costs which distinguishes that item from the other incidents of a suit. "Costs," it states, "are a substantive liability," and therefore not included within either mean-

ing or connotation of the "sue and be sued" clause. There seems to be some confusion of thought here. We see no compelling reason why they cannot be both. If, however, they represent a substantive liability, rather than an incident of suit, then counsel's argument would seem to be this:

1. Congress allows R. F. C. (or the other governmental agencies) to sue and be sued.

2. This means that R. F. C. can sue for a substantive liability (such as breach of contract, tort, etc.), and may be sued for the same.

3. Costs are a substantive liability.

4. Therefore, R. F. C. may *not* sue or be sued for the same.

5. This proves that either Congress or ourself (petitioner) is suffering from intellectual strabismus. *cf. Keifer & Keifer v. R. F. C., supra,* 306 U. S. 381, at pages 393 and 394.

If premises 1, 2, and 3 are sound, as they are asserted to be, then it would seem that the conclusion (4) would have to be altered. Otherwise, in the words of the late Timothy D. Sullivan "onions is fruit."

Nor can we construe the phrase "sue and be sued" as having any more or less than the ordinary meaning. It is not a grant of power, much less a grant of immunity, but is a condition of its creation and existence.

> "The State of Delaware allowed defendant to be created, but *as a condition of its creation and exist-*

ence, it afforded the right to anyone to sue the corporate entity which it thus created."

Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, Inc., 268 Fed. 575, 584.

But petitioner's counsel say that there is no difference in essentiality between the functions of the United States, citing *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, and *Graves v. O'Keefe*, 306 U. S. 406. This we concede to be so. But, in *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, this Court confessed itself at a loss to make a definition of "essential governmental functions" which would cover all cases (op. pp. 361, 362), and in *Helvering v. Therrell*, 303 U. S. 218, at page 223, it repeated this statement, "By definition precisely to delimit 'delegated powers' or 'essential governmental duties' is not possible." But the two cases cited by petitioner *(Pittman v. Home Owners' Loan Corp.* and *Graves v. O'Keefe*, both *supra)*, while they involve tax questions, are valuable as illustrative of the manner in which immunity can solely be conferred. The *Pittman* case arose out of an attempt on the part of the State of Maryland to assess a recording tax on H. O. L. C. mortgages. This corporation had been exempted by Congress from all state or municipal taxes, as to its franchise, capital, reserves, and surplus, income and loans. This Court held that the tax was on loans, and that Congress had the authority, *by express grant*, to confer this exemption.

In the *Graves* case, there was no statutory exemption. This Court held that "silence on the part of Congress implies immunity no more than does the silence of the Constitution"; and further, that when "exemption * * * is claimed on the ground that the federal government is burdened by

the tax, and *Congress has disclosed no intention with respect to the claimed immunity,* it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

This throws light on the language used by Mr. Justice Frankfurter in the *Keifer* case, *supra;* "Congress may, of course, *endow* a governmental corporation with the government's immunity."

It would therefore seem plain beyond peradventure that immunity of any kind must be the subject of an express grant by Congress, and cannot arise by implication.

Costs have been held to be a substantive right, although ancillary to the judgment.

United States v. French Sardine Co., Inc., 80 Fed. (2d) 320.

Newton v. Consolidated Gas Company, 265 U. S. 78.

U. S. ex rel. McBride v. Schurz, 102 U. S. 378.

U. S. v. Boutwill, 17 Wall 604.

and as such, would seem, of necessity, to be covered by the phrase "sue and be sued," for it is impossible to say that Congress intended to exclude this right or liability and include all others.

Western Coal and Mining Co. v. Petty, 132 Fed. 603, 604.

Kettredge v. Race, 92 U. S. 116.

Trinidad Asphalt Co. v. Robinson, 52 Fed. 347.

U. S. v. Treadwell, 15 Fed. 532.

Cooper v. New Haven Steamboat Co., 18 Fed. 588.
Merritt v. Merritt, 20 Fed. (2d) 541.
National Surety Co. v. Lyons, 16 Fed. (2d) 688, 692.
Primrose v. Fenno, 113 Fed. 375, 376.
Shreve v. Cheesman, 69 Fed. 785.
Eldredge v. Jackson, 2 Sawyer, 598, 600.
Treat v. Farmers' Loan and Trust Co.; 185 Fed. 760, 763.
United States v. Davis, 54 Fed. 147.

And it was held specifically in *Missouri Pacific R. R. v. Ault*, 256 U. S. 554, 563-565, that compensatory damages reasonably included interest and costs.

From the foregoing it would seem that the claimed immunity of governmental corporations from suit or from costs does not exist.

C. THE RECONSTRUCTION FINANCE CORPORATION FORMS NO EXCEPTION TO THE GENERAL RULE.

The learned counsel for the petitioner in essence concedes that not every corporation created by Congress enjoys the immunity from costs which petitioner claims for itself (Brief page 10). They draw a supposed distinction between some governmental corporations (of which the Emergency Fleet Corporation and others are cited as examples, p. 11) and those like the R. F. C., whose functions, it is claimed, are purely governmental in character, because they are created simply to do the government's work.

On this phase of the issue, it would seem that the petitioner enters the contest badly disfigured. The backbone

of this argument is broken by the holding of this Court in the *Keifer & Keifer* case, *supra*, "The government does not become the conduit of its immunity in suit against its agents or instrumentalities merely because they do its work." (306 U. S. p. 388.) This case would seem to define the exact status of the petitioner herein.

However, it had been earlier defined.

> "The Reconstruction Finance Corporation Act created a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is nevertheless a corporation, limited by its character *and by the general law.* The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations."
>
> *Continental Nat. Bk. v. Rock Island Ry.*, 294 U. S. 648, 684.

And in *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209, this Court pointed out that under the authority of *McCullock v. Maryland*, 4 Wheat. 316, that (R. F. C.) "a corporation so conceived and operated is an instrumentality of government *without distinction in that regard between one activity and another.*"

Plainly, another situation arises when the question of state taxation of governmental instrumentalities is concerned. Such is the *Clallam County* case *(Clallam County v. United States*, 263 U. S. 341). That case was decided, like many others *(e. g. Pittman v. Home Owners' Loan Corp., supra)*, on the authority of *McCullock v. Maryland*, 4 Wheat 316, *supra*. But exemption from taxation (usually found in the Act erecting the corporation) does not mean exemption from suit and its corollary incidents. The con-

trary is the case, even when the significant words "sue and be sued" are omitted.

Keifer & Keifer v. R. F. C., supra.

Furthermore, as was pointed out by Mr. Justice Frankfurter in the *Keifer* case, Congress has spawned some forty of these corporations (list on margin of page 389) and "has always included amenability to law and without exception the authority to sue and be sued was included." Petitioner would have us believe that this phrase means one thing when applied to it, and quite another when applied to some or all of the other thirty-nine governmental corporations mentioned by Mr. Justice Frankfurter, presumably of a low order, "as also are these publicans." This contention is not new. It has even found support in some quarters.[1]

In the absence of a specific and manifest intent on the part of Congress to the contrary, it must be assumed that Congress attached the same meaning to this phrase in all cases. And Congress will be presumed to have used a word in its usual and well settled sense.

United States v. Stewart, 61 Sup. Ct. 102 (Adv. Sheets, decided Nov. 12, 1940).

But, asserts petitioner, "We are part of the government, itself." Well, so is a United States Commissioner. So is a

1. "I don't know what you mean by 'glory,'" Alice said.
Humpty Dumpty smiled contemptuously, "
"Of course you don't—'till I tell you. I meant 'there's a nice knock down argument for you!'"
"But 'glory' doesn't mean 'nice knock down argument,'" Alice objected.
"When I use a word," Humpty Dumpty said, in rather a scornful tone, "It means just what I choose it to mean—neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master—that's all."

letter carrier. "True, as we have assumed, the Reconstruction Finance Corporation is a governmental agency, but so also is a national bank." (Cardozo, J., in *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209 *supra*, 212.)

And this Court has steadfastly refused to discriminate between various types of governmental activities—starting with *McCullock v. Maryland, supra*, and leaving the differentiation, if any, to be made by Congress.

So at length we return to the starting point of our discussion. Anything that can be said would only add to or contradict the words of Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia*, "As a member of a corporation, the government never exercises its sovereignty."

It would unduly protract this brief to discuss all the cases cited by the petitioner, so that those not apparently germane now receive no comment. It is necessary, however, to distinguish the cases relied on as showing the "trend of judicial opinion" in relation to costs. Of these, in *National Home v. Wood*, 81 Fed. (2d) 964, the Court held that the suit was in reality against the United States, despite its form, and denied costs for that reason. Its conclusion was inescapable, in view of the express provisions of Title 38, Section 11d (U. S. C.), providing for the dissolution and liquidation of the National Home. There Congress says in so many words that all contracts and other valid obligations of the Home shall continue and be obligations of the United States, "and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation."

It was because of this statute that the Supreme Court held that costs were properly denied. (299 U. S. 211, note page 212.)

In *Federal Deposit Insurance Corp. v. Barton*, 106 Fed. (2d) 737, the title of the plaintiff to the insured deposit was not entirely clear. So the Circuit Court of Appeals held, in affirming, that it was the duty of the defendant, under Title 12, Section 264, Sub. L (7) U. S. C. to present the issues for the determination of the Court, and for that reason costs should not be taxed against it. Under the circumstances presented in the Court's opinion, we cannot see how it could have held otherwise.

In *Federal Deposit Insurance Corp. v. Casady*, 106 Fed. (2d) 784, the Tenth Circuit held that "Appellant being a governmental agency, costs should neither be awarded in its favor nor against it in this action * * *. Paragraph (d), Rule 54, Federal Rules of Civil Procedure." Then follow citations of several cases holding that the appellant and other governmental corporations are governmental agencies, and that only. The immunity of the latter from costs was assumed, not decided; and the text of the language used shows that the Court did not have in mind the text of Rule 54(d). We say this because there is nothing in Rule 54(d) which denies costs to a successful governmental agency, to a successful governmental officer, or to the United States, itself, when it prevails. Of course, such a rule prevails in this Court (Rule 32.5) and is also found as regards appellate costs in many of the rules of the different Circuit Courts of Appeal, usually expressly limited however to instances where the United States is a party; and it would seem probable that the learned Tenth Circuit had these rules in

mind, rather than Rule 54 (d). In other words, it appears to be a plain oversight, which might readily have been corrected by petition for rehearing.[1]

However this may be, the decision of the *Casady* case must be considered as overruled by the holding of this Court in the *Burr* case; since the denial of the greater immunity would seem to dispose of the lesser one.

To rule otherwise would seem to us to be granting to these governmental corporations an immunity not only greater than that of governmental officers (*U. S. ex rel. McBride v. Schurz*, 102 U. S. 378; *U. S. v. Boutwell*, 17 Wall, 604), but also an immunity greater than that of the sovereign itself, for under certain statutes, the United States is amenable to costs (Title 28, U. S. C. 761; Title 46 U. S. C. 781), and Congress appropriates the funds to pay them (First Deficiency Appropriation Act 1940, Chapter 77, 3rd Session 76th Congress, Sec. 202, (a) and (b)).

The contrary suggestion also carries with it an implication that this Court intended, by rule, not only to overturn its own holdings for more than one hundred fifty years, but also to exceed the limitations imposed by Congress upon its rule making authority,[2] although the exact contrary was held by both of the Courts below in this case (Record, pp. 10, 15), and is in fact urged by the petitioner, itself.

1. The point seems not to have been stressed,—Appellees' brief contains the following language; "The question of costs is raised by appellant and with this we may have little interest in view of the certainty that if appellees prevail, they will in no event be charged with the costs." Appellees' counsel advises that the costs in dispute did not exceed Ten dollars.

2. "Said rules shall neither abridge, enlarge or modify the substantive rights of any litigant." Title 28, Sec. 723 (a) U. S. C. Act of June 10 1934, ch. 651, secs. 1 and 2.

D. THE ADDITIONAL ALLOWANCE SOUGHT IS NOT A PENALTY, AND THE DISTRICT COURT HAS POWER TO MAKE IT.

Missouri Pacific R. Co. v. Ault, 256 U. S. 554, *supra*, is wholly in our favor as to costs as such. The present case is in equity, and the power derives, as was pointed out clearly in *Sprague v. Ticonic National Bank*, 307 U. S. 161, from English Chancery practice as part of the historic equity jurisdiction of the United States. Also, says Mr. Pomeroy (Equ. Jurisp. Section 294),

> "The third principle relates to the extent of the jurisdiction. While the equitable jurisdiction of the national courts is derived wholly from the United States Constitution and statutes, it is identical or equivalent in extent with that possessed by the English high court of Chancery at the time of the Revolution. The judicial functions and powers of the English Court of Chancery are held to have been conferred *en masse* upon the national judiciary; but not the peculiar administrative functions held by the chancellor as representative of the crown in its character of *parens patriae*. These latter functions of the English chancellor have not been granted to the United States courts, but are given to the several states, and are exercised either by the state legislatures or by the state tribunals. The United States Supreme Court has frequently laid down and acted upon this principle in deciding cases brought for the purpose of enforcing charitable trusts."

The subject is so ably discussed in the *Sprague* case that any paraphrasing of Mr. Justice Frankfurter would not only be inept, but supererogatory. However, it may be said to be a doctrine peculiar to equity practice. Equity never awards penalties. This proposition alone should refute the argument that the allowance has the nature of a penalty.

Conclusion.

Since all the contentions of the petitioner appear to have been disposed of by prior decisions of this Court, it is respectfully submitted that the judgment of the Circuit Court of Appeals was right and should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1940.

Reconstruction Finance Corporation, Petitioner, *vs.* J. G. Menihan Corp., J. G. Menihan, Sr., and J. G. Menihan, Jr. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 3, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner, Reconstruction Finance Corporation, took mortgages and assignments of real and personal property of a corporation, including its trade-marks and trade names, as security for a loan. On a sale by the trustee in bankruptcy of the debtor, petitioner purchased the property. A new corporation undertook to use the trade-marks and petitioner sought an injunction. Decree went against petitioner. Defendants' application for costs and additional allowance was denied. 29 F. Supp. 853. This order was reversed by the Circuit Court of Appeals, 111 F. (2d) 940, and we granted certiorari because of a conflict of decisions. See *Federal Deposit Insurance Corporation* v. *Casaday*, C. C. A. 10th, 106 F. (2d) 784.

Rule 54(d) of the Rules of Civil Procedure provides that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law". This provision was merely declaratory and effected no change of principle.

The Reconstruction Finance Corporation is a corporate agency of the government, which is its sole stockholder. 47 Stat. 5; 15 U. S. C. 601. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The Corporation has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions (see *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21, 32, 33), still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549, 566, 567. Congress has expressly provided that the

Reconstruction Finance Corporation shall have power "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal". There is nothing in the statutes governing its transactions which suggests any intention of Congress that in suing and being sued the Corporation should not be subject to the ordinary incident of unsuccessful litigation in being liable for the costs which might properly be awarded against a private party in a similar case.

We have had recent occasion to consider the status, in relation to suits, of a regional corporation chartered by the Reconstruction Finance Corporation and we have set forth the general principles which we think should govern in our approach to the particular question now presented. *Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381. In the *Keifer* case we did not find it necessary to trace to its origin the doctrine of the exceptional freedom of the United States from legal responsibility, but we observed that "because the doctrine gives the government a privileged position, it has been appropriately confined". Hence, we declared that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work". *Id.*, p. 388. Recognizing that Congress may endow a governmental corporation with the government's immunity, we found the question to be "Has it done so?" That is, immunity in the case of a governmental agency is not presumed. We sought evidence that Congress had intended that its creature, considering the purpose and scope of its powers, should have the immunity which the sovereign itself enjoyed, and we noted the practice of Congress as an indication "of the present climate of opinion" which had brought governmental immunity from suit into disfavor. Accordingly, being unable to find that Congress had intended immunity from suit we denied it.

It was with a similar approach that we decided in *Federal Housing Administration* v. *Burr*, 309 U. S. 242, that the Federal Housing Administration was subject to be garnished under state law for moneys due to an employee. There, the Administrator under the National Housing Act was authorized "to sue and be sued in any court of competent jurisdiction, State or Federal". 49 Stat. 722. Starting from the premise indicated in the *Keifer* case that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental im-

munity—we concluded that in the absence of a contrary showing "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be". Following that reasoning, the precise point of the decision was that the words "sue and be sued" normally embrace all civil process incident to the commencement or continuance of legal proceedings and hence embraced garnishment as part of that process.

These decisions chart our course. The Reconstruction Finance Corporation is expressly authorized to sue and be sued. It has availed itself of that authority to bring the defendants into court to answer the charge of trade-mark infringement. The defendants have successfully resisted the charge and the question is whether they should be denied the usual incidents of their success. We apply the principle that there is no presumption that the agent is clothed with sovereign immunity. We look as in the *Keifer* and *Burr* cases to see whether Congress has endowed petitioner with that immunity and we find no indications whatever of such an intent. We apply the farther principle that the words "sue and be sued" normally include the natural and appropriate incidents of legal proceedings. The payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident. The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. *Sprague* v. *Ticonic Bank*, 307 U. S. 161. We perceive no reason for holding that petitioner may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process in case its assertions of right prove to be unfounded. On the contrary, we think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances.

The judgment of the Circuit Court of Appeals is affirmed.

Affirmed.

Mr. Justice BLACK took no part in the consideration and decision of this case.